

Administrative Rules Oversight Committee Notice
60 Day Requirement ([IC 4-22-2-19](#))
LSA Document #12-404

August 27, 2012

Senator R. Michael Young, Chair
Administrative Rules Oversight Committee
c/o Legislative Services Agency
200 West Washington Street, Suite 301
Indianapolis, Indiana 46204-2789
Attn: Sarah Burkman, AROC Counsel

Re: LSA Document #12-404 – Proposed Rule Regarding Administrative Reviews and Hearings

Dear Senator Young:

On behalf of the Indiana Department of Child Services (DCS), I am submitting this notice to the Administrative Rules Oversight Committee in compliance with [IC 4-22-2-19](#), which requires an agency to begin the rulemaking process not later than 60 days after the effective date of the statute that authorizes the rule, with certain exceptions not applicable to this notice.

This proposed rule codifies in a new Article 3 of Title 465 IAC rules and procedures for conduct of administrative hearings that DCS is required to provide by current state or federal law or rule, relating to certain determinations that the department makes in performing its statutory duties and responsibilities. Rule 1 ([465 IAC 3-1](#)) provides definitions applicable to Article 3. Rule 2 ([465 IAC 3-2](#)) provides procedures for department administrative review of certain determinations before a hearing can be requested and held. Rule 3 specifies procedures for the conduct of administrative hearings by administrative law judges employed by DCS and appointed to conduct those hearings and issue decisions, subject to the right of judicial review under [IC 4-21.5-5](#). Except for hearings that the applicable statute or rule requires to be conducted under [IC 4-21.5-3](#); i.e., notices of intent to intercept state income tax refunds owing to delinquent child support obligors ([IC 6-8.1-9.5-7](#)), denial or revocation of licenses issued by DCS under [IC 31-27](#) for residential care and supervision of children, and payment rate determinations for contracted residential treatment services providers or child placing agencies ([465 IAC 2-16-27](#), [465 IAC 2-17-28](#)); hearings regarding determinations made by DCS are exempt from the procedures specified in [IC 4-21.5-3](#), under [IC 4-21.5-2-6](#)(1).

The general statutory authority for this rule is [IC 31-25-2-18](#), originally enacted in the law establishing DCS as a separate state agency ([IC 31-33-1.5-11](#), Sec. 95 of P.L.234-2005, recodified by Sec. 271 of P.L.145-2006), which states that "the department may adopt rules under [IC 4-22-2](#) necessary to carry out the department's or [child support] bureau's duties under this article". In addition, some statutes include specific rule authorization or requirements for particular programs or determinations, including [IC 31-19-26.5-12](#) (state adoption subsidy program), [IC 31-25-4-27](#) (child support provisions of Title IV-D of the federal Social Security Act and [IC 31-25-4](#)), and [IC 31-33-26-13](#) (hearings and reviews for substantiated child abuse or neglect determinations entered in the child protection index). This proposed rule has been delayed due to the desire and need to include in a single IAC location the review and hearing procedures applicable to the variety of programs and determinations for which the reviews and hearings are required or provided. The rule development has also benefitted from DCS experience with administration of programs to which the rule applies. That experience has been needed to identify and fully consider details of the most appropriate procedures to address the issues arising in those programs and determinations that relate to the hearing requirements. The particular rule authorization statutes that are addressed in this rule are outlined below.

1. Child abuse or neglect substantiations – [IC 31-33-26-13](#). This section was enacted by P.L.138-2007, Sec. 67, effective July 1, 2007. It directs DCS to adopt rules covering three matters related to perpetrators of substantiated reports entered in the child protection index established under [IC 31-33-26](#): (1) procedures consistent with [IC 31-33-26-9](#) for the identified perpetrator to request and obtain an administrative hearing; (2) procedures for conduct of the administrative hearing; and (3) provisions for administrative review of a proposed or approved substantiated report, either before or after an administrative hearing is available or conducted. However, section 94 of that statute (non-code) provided that rules were not required until July 1, 2011, provided that DCS adopted and implemented written policies covering the described subjects. Since this is the first statute

providing for administrative reviews and hearings on this subject, DCS adopted, and has continued to operate under, written policies available on the department website, while gaining experience with those procedures that would assist in drafting permanent rules. That experience revealed that problems existed with application of the statutory wording of [IC 31-33-26-9\(c\)](#) as applied to receipt and use of information provided to DCS staff by children who could not provide in-person testimony at a formal hearing. The department sought and obtained an amendment to the statutory language concerning use of admissible hearsay evidence that was enacted in P.L. 162-2011, Sec. 48, effective July 1, 2011. The department also sought and obtained an amendment to the statute applicable to admissibility of certain child statements or videotapes in child in need of services court cases, [IC 31-34-13](#), to make that procedure applicable to administrative hearings under [IC 31-33-26-9](#), that was enacted in P.L. 48-2012, Sec. 61, effective July 1, 2012. The department has continued to implement these hearing and review procedures through existing policies, amended to reflect these recent statutory changes, pending adoption of this rule.

2. Adoption subsidies – [IC 31-29-26.5-12](#). This section was enacted by P.L. 146-2008, Sec. 562, effective January 1, 2009, as part of the new chapter authorizing state-funded adoption subsidies, replacing the former county adoption subsidy program, that provides financial assistance in the form of periodic payments for certain adoptions not eligible for the corresponding federal adoption assistance program (AAP). It directs DCS to adopt rules "as needed" to carry out the state adoption subsidy program. The rules are to cover five subjects related to administration of the program, as detailed in the statute. This program is an authorization, not an entitlement. The department issued a policy in the form of an administrative letter (DCS 08-13), effective January 1, 2009, that addresses both the state and federal program implementation procedures. Certain program changes and updates were implemented through supplemental administrative letters, DCS 09-24 (issued October 1, 2009) and DCS 11-03 (issued April 8, 2011). Currently the state program is not being funded for periodic payments, although the eligibility of applicants is determined for purposes of establishing Medicaid eligibility for the adopted children and a waiting list established for possible future funding of periodic payments to eligible applicants. Rules covering administration of both state and federal programs have not been adopted by DCS. The programs are currently implemented through a set of policies that superseded the administrative letters, effective July 1, 2012. To the extent those policies are inconsistent with rule provisions originally adopted in 1982 by the former State Welfare Department and transferred to DCS by P.L. 234-2005, Sec. 195 (effective July 1, 2005), and that appear at [465 IAC 2-7-1](#) through [465 IAC 2-7-3](#), the old rule provisions are considered obsolete and no longer applicable. There is no state statute detailing the provisions applicable to the federal AAP, or directing DCS to adopt rules relating to administration of that program, which DCS is authorized to provide as a component of "child services" defined in [IC 31-9-2-17.8\(1\)\(E\)](#). A recent amendment to that statute also authorizes both a federal and state-funded kinship guardianship assistance program, which DCS is implementing effective July 1, 2012, through policies that will be codified in a rule at a later time.

This proposed rule addresses only that part of the new policies that relate to administrative reviews and hearings available for specified determinations under the AAP, state adoption subsidy, and guardianship assistance programs, for inclusion in the new article covering all categories of administrative reviews and hearings that DCS provides. Before January 1, 2009, administrative hearings relating to AAP disputes were conducted by the FSSA Office of Hearings and Appeals under [470 IAC 1-4](#). Any hearings requested concerning DCS adoption assistance or subsidy program decisions after January 1, 2009 have been conducted by DCS in accordance with [470 IAC 1-4](#). In light of this background and history of the development and administration of these programs, DCS does not have a need at this time for a rule addressing the other subjects outlined in [IC 31-19-26.5-12](#), in relation to the state adoption subsidy program.

3. Residential treatment services provider and child placing agency payment rates – [465 IAC 2-16](#) and [465 IAC 2-17](#). There is no statute addressing the manner in which DCS determines payment rates for services provided to or for the benefit of children who are wards of DCS and are placed with, or referred to, agencies or homes that DCS licenses for categories of residential or placement services under [IC 31-27](#). In 2011 DCS adopted rules regarding the methodology used to determine those payment rates, which are codified at [465 IAC 2-16](#), [465 IAC 2-17](#), and [465 IAC 2-18](#). The rules include provisions for administrative reviews and hearings concerning any disputes relating to determination of administrative payment rates and certain other payments to licensed child caring institutions, group homes, and child placing agencies. They do not provide administrative reviews or hearings regarding payments to foster family homes for care and maintenance of children, since those payments are made in accordance with a schedule of payment categories based on the child's age and category of supervision determined by a needs assessment. The applicable review and hearing procedures are codified at [465 IAC 2-16-26](#), [465 IAC 2-16-27](#), [465 IAC 2-17-27](#), and [465 IAC 2-17-28](#). This proposed rule incorporates those procedures by reference.

4. Child support collection and enforcement procedures - [IC 31-25-4-27](#). This section was enacted by

P.L. 145-2006, Sec. 271, effective July 1, 2006, as part of the recodification and revision of the chapter concerning child support provisions of Title IV-D of the federal Social Security Act, formerly contained in Title 12. The child support bureau that administers that program was established as part of DCS in 2005 by P.L. 234-2005 ([IC 31-33-1.5-8](#), recodified by P.L. 145-2006 as [IC 31-25-3-1](#)). The section provides that DCS "shall adopt rules necessary to implement Title IV-D of the federal Social Security Act and this chapter". The chapter contains several sections that require availability of expedited administrative hearings, for which the basic procedures and parameters are specified in [IC 31-25-4-33](#). In addition, hearings may be requested under [IC 6-8.1-9.5-7](#) by a child support obligor taxpayer who receives notice of intent to intercept a state income tax refund, or under [IC 31-16-15-4.3](#) by a child support obligor who receives notice of an income withholding order issued by the child support bureau under authority of [IC 31-16-15](#). A hearing may also be requested by a child support payee who is or has been a recipient of public assistance under Title IV-A of the Social Security Act (TANF) concerning distribution of the collections between the State and the payee. Hearings under [IC 6-8.1-9.5-7](#) are held under applicable provisions of [IC 4-21.5-3](#). Other hearings are held under rules of the department in accordance with applicable statutory provisions.

Before July 1, 2009, hearings related to child support collection procedures were conducted by the FSSA Office of Hearings and Appeals. Hearings that had not been held or completed before that date, or that were requested thereafter, have been held by DCS. The DCS administrative law judges have continued to schedule and hold those hearings under [470 IAC 1-4](#), supplementing the applicable statutory provisions. The proposed rule recodifies and revises those procedures in the new [465 IAC 3-3](#). As required by [IC 31-25-4-27](#), a copy of the proposed rule is being sent to the Indiana child custody and support advisory committee established by [IC 33-24-11-1](#).

5. Licensing determinations. The statutes requiring licensing of residential child caring facilities or group homes, foster family homes, and child placing agencies were transferred to DCS by P.L. 145-2006, effective July 1, 2006. Those statutes are codified at [IC 31-27](#) chapters 2 through 6. The grounds for approval, denial or revocation of licenses, and the basic requirements for enforcement actions, are stated in the respective statutes governing the categories of licenses. The particular rule authorization statute for licensing is [IC 31-27-2-4](#), which directs the department to adopt rules concerning licensing and inspection of the homes and agencies required to be licensed, as well as rules establishing minimum standards for care and treatment of children in a secure private facility regarding five specified topics, subject to waivers or variances that can be granted under the provisions of [IC 31-27-2](#) sections 8 through 11. The department has adopted those rules, or amended the applicable rules transferred to DCS from the Division of Family Resources (formerly Division of Family and Children) in FSSA, which are located at [465 IAC 2](#) Rules 1.5, 2, 9, 10, 11, 12, and 13. There is no specific statute requiring rules for proceedings relating to license denials, revocations, or other rule enforcement actions. Therefore, the provisions of this proposed rule relating to licensing determinations are authorized under the general rule authorization statute, [IC 31-25-2-18](#).

After transfer of these licensing functions to DCS and before July 1, 2009, the administrative hearings required by the statutes continued to be scheduled and heard by the FSSA Office of Hearings and Appeals. Effective July 1, 2009, DCS assumed responsibility for scheduling and holding hearings as requested, for any licensing decisions made after that date. The statutes included deadlines applicable to those hearings. They required that a hearing be held within 60 days after receiving a written request, and that the department issue a decision within 60 days after conclusion of the hearing. Those provisions were problematic. In addition to their effect on scheduling and completing other hearings, they were inconsistent with the provisions of [IC 4-21.5-3-27\(g\)](#) (ALJ shall issue written order within 90 days after conclusion of hearing or post-hearing submissions), and [IC 4-21.5-3-29\(f\)](#) (final order shall issue within 60 days after date ALJ order issues or close of final order proceedings). The statutory deadlines were removed from the licensing statutes in [IC 31-27](#) by amendments adopted in P.L. 128-2012, effective July 1, 2012. Therefore, the proposed rule omits any reference to special deadlines applicable to licensing hearings, and provides procedures supplementary to [IC 4-21.5-3](#), replacing the current FSSA rule located at [470 IAC 1-4](#). The proposed rule on pre-hearing administrative reviews does not apply to licensing decisions, because the respective statutes provide that a licensee may request an informal meeting with DCS staff concerning a revocation or enforcement action, and the application review process provides ample opportunities for discussions with the licensing staff about any issues that arise in processing a license application.

The notice of intent to adopt a rule was posted to the Indiana Register on July 11, 2012. The State Budget Agency has reviewed the proposed rule and submitted its recommendation for approval. The proposed rule, together with the economic impact statement required by [IC 4-22-2.1-5](#), has been submitted to the Indiana Register for publication as provided in [IC 4-22-2-24](#), and to the Indiana Economic Development Corporation small business ombudsman for review as provided in [IC 4-22-2.1-6](#). We have received the authorization to proceed

under [IC 4-22-2-24\(g\)](#). The proposed rule and economic impact statement, together with the notice of public hearing, are scheduled for posting in the Register on August 29, 2012. The public hearing is scheduled for September 28, 2012. We have established a link on the DCS website to the rulemaking docket for this proposed rule that includes the information specified in [IC 4-22-2-22.5](#) in the format approved by the Attorney General, and will update that docket information periodically, as needed, during the rule adoption process. We expect that the final rule can be adopted, approved, and submitted to the Indiana Register for publication before the end of calendar year 2012.

If you need additional information, please do not hesitate to contact me at (317) 233-6547 or ljohn.wood@dcs.in.gov.

Sincerely,

John Wood
Deputy General Counsel
Indiana Department of Child Services

cc: Indiana Register
James W. Payne, Director, DCS
Jeffrey M. Lozer, General Counsel, DCS

Posted: 08/29/2012 by Legislative Services Agency
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